80-231

No.

In the Supreme Court of the United States

OCTOBER TERM, 1979

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL., APPELLANTS

v.

STATE OF INDIANA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

JURISDICTIONAL STATEMENT

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STATE OF INDIANA, ET AL.**

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JURISDICTIONAL STATEMENT

QUESTIONS PRESENTED

The principal regulatory and enforcement provisions of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. I) 1201 *et seq.*,

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* Other defendants below and appellants in this Court are the Director of the Office of Surface Mining Reclamation and Enforcement, the Office of Surface Mining Reclamation and Enforcement, the United States Department of the Interior and the United States of America.

** Other plaintiffs below and appellees here are the Governor of Indiana, the Director of the Indiana Department of Natural Resources, the Indiana Department of Natural Resources, the Indiana Coal Association, Meadowlark Farms, Inc., Amax Coal Company, Peabody Coal Company, and John A. Conlon.

are contained in Title V of the statute, 30 U.S.C. (Supp. I) 1251-1279. Among the more important provisions in Title V are those dealing with surface mining on prime farmlands, the handling and replacement of topsoil during and after surface mining operations, the restoration of mined lands to their approximate original contour, the designation of certain lands as unsuitable for surface mining, and the pre-mining administrative review of proposed post-mining land uses. The questions presented in this case are:

1. Whether the aforementioned provisions in Title V of the Surface Mining Act exceed Congress' powers under the Commerce Clause of Article I, Section 8, of the Constitution.

2. Whether the same provisions violate the Tenth Amendment.

3. Whether the "prime farmland" and approximate original contour provisions in Title V of the Surface Mining Act violate the Due Process Clause of the Fifth Amendment because they are arbitrary and capricious or impermissibly discriminate among coal mine operators in different states.

4. Whether the provisions in Title V concerning the reclamation of prime farmlands after surface mining and the designation of certain lands as unsuitable for surface mining take private property without just compensation in violation of the Fifth Amendment.

5. Whether Section 518(c) of the Surface Mining Act, 30 U.S.C. (Supp. I) 1268(c), violates the Due Process Clause of the Fifth Amendment by requiring that proposed civil penalties be paid into an interest-bearing escrow account before full administrative review of such proposed penalties may be obtained.

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OPINION BELOW

The opinion of the district court (App. A, *infra*, 1a-44a) is not yet reported.

JURISDICTION

The final order and judgment of the district court (App. B, *infra*, 45a-49a) was entered on June 10, 1980. The Secretary of the Interior filed a notice of appeal to this Court on June 16, 1980 (App. C, *infra*, 50a-51a). The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, of the United States Constitution, the Fifth and Tenth Amendments to the Constitution, and the relevant portions of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. I) 1201 *et seq.*, are reprinted in App. F, *infra*, 55a-68a.

STATEMENT

1. Like *Virginia Surface Mining and Reclamation Ass'n* v. *Andrus*, 483 F. Supp. 425 (W.D. Va. 1980), pending on appeal, Nos. 79-1538, 79-1567, and 79-1596, and *Star Coal Co.* v. *Andrus*, No. 79-171-2 (S.D. Iowa Feb. 13, 1980), pending on appeal, No. 80-49, this case involves a broad constitutional challenge to numerous important provisions of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. I) 1201 *et seq.* Because of geographical differences between Virginia and Indiana and the resulting differences in the methods and effects of surface coal mining operations in the two

states, many of the specific provisions attacked in the present case are different from the "steep slope" provisions that were the primary focus of plaintiffs' complaint in *Virginia Surface Mining*. Plaintiffs' legal theories in the two cases are virtually identical, however.

The basic structure of the Surface Mining Act is described in 79-1538 J.S. 3-7.[1] The specific provisions of the Act challenged by the State of Indiana and the other plaintiffs below are listed in the district court's opinion (App. A, *infra*, 3a-5a). For present purposes, the following brief description of the challenged provisions should suffice.

First, plaintiffs attack several sections of the Act known collectively as the "prime farmland" provisions. These sections establish certain special requirements for surface mining operations that are to be conducted on land that qualifies as prime farmland under a definition promulgated by the Secretary of Agriculture. See Section 701(20) of the Act, 30 U.S.C. (Supp. I) 1291(20). For example, Section 510(d)(1) of the Act provides that an application for a surface mining permit on prime farmland is to be granted only if the mine operator can demonstrate his technological capability to restore mined land to an equivalent or improved prime farmland use and to meet the soil reconstruction standards for prime farmland set forth in Section 515(b)(7). 30 U.S.C. (Supp. I) 1260(d)(1), 1265(b)(7). Furthermore, Section 519(c)(2) provides that, upon the completion of mining activities on prime farmland, a mine operator's performance bond will be released only when soil productivity "has returned to equiva-

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[1] A copy of the jurisdictional statement in No. 79-1538 has been sent to appellees.

lent levels of yield as nonmined land of the same soil type in the surrounding area under equivalent management practices * * *." 30 U.S.C. (Supp. I) 1269 (c)(2).

In addition to the prime farmland provisions, plaintiffs challenge a variety of more general sections in the Act applicable uniformly throughout the country. These include Section 515(b)(3)'s requirement that mined land be restored to its approximate original contour and the command in Section 515(b)(5) that surface mine operators remove topsoil separately during mining activities and preserve it for use during reclamation if it is not to be replaced immediately on the backfill area of the mining cut. 30 U.S.C. (Supp. I) 1265(b)(3), (5). Plaintiffs object generally to the provisions in Section 508 of the Act that require applicants for surface mining permits to include in their application proposed reclamation plans specifying the intended post-mining use for the land involved and the method by which that use will be achieved. 30 U.S.C. (Supp. I) 1258. Plaintiffs also complain about Section 522 of the statute, which requires states that wish to assume primary regulatory authority over surface mining operations within their borders to establish and implement a planning and administrative review procedure for determining whether particular lands are unsuitable for some or all kinds of surface mining. 30 U.S.C. (Supp. I) 1272(a), (c), (d).[2] Like the plaintiffs in *Virginia*

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[2] With the exception of Georgia, Alaska, and Washington, all states in which surface coal mining is conducted have submitted to the Secretary of the Interior proposed state programs under which the states wish to assume primary regulatory authority over surface mining operations, in accordance with Section 503 of the Act. 30 U.S.C. (Supp. I)

Surface Mining, plaintiffs here object specifically to Section 522(e)(4) and (5)'s general injunction against surface mining within 100 feet of roadways and cemeteries or within 300 feet of public buildings, schools, churches, public parks, or occupied dwellings. 30 U.S.C. (Supp. I) 1272(e)(4) and (5); see 79-1538 J.S. at 11 & n.7.

Finally, like the plaintiffs in *Virginia Surface Mining* and *Star Coal*, plaintiffs in the present case challenge the Surface Mining Act's procedure for collecting proposed civil penalties. Under Section 518(c) of the Act, a mine operator seeking full administrative review of a proposed civil penalty assessed as the result of an alleged violation of the Act must first deposit the amount of the proposed penalty into an interest-bearing escrow account. If it is determined during the ensuing administrative review procedure that the operator is not liable for some or all of the assessed penalty, the overpaid amount is returned to the operator with interest. 30 U.S.C. (Supp. I) 1268(c).

2. The present case comprises two companion suits, consolidated for all purposes. Both were filed in August 1978, the first by the State of Indiana and several of its officials, and the second by the Indiana Coal Association, coal mine operators, and others. Plaintiffs contended: (1) that all the substantive statutory provisions described above (*i.e.*, all the provisions mentioned with the exception of Section 518(c)) are beyond the scope of the congressional power to regulate interstate commerce un-

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1253. The Secretary has not yet acted on most of the proposed state programs, including that submitted by Indiana. Accordingly, the interim regulatory phase of the Act is still in effect in Indiana.

der Article I, Section 8, of the Constitution; (2) that the same provisions violate the Tenth Amendment because they regulate land uses, thereby usurping an "integral governmental function" traditionally reserved to and performed by the states; (3) that the provisions of the Act dealing with reclamation of prime farmlands and restoration of mined lands to their "approximate original contour" violate the substantive due process and equal protection guarantees of the Fifth Amendment because they impermissibly discriminate among mine operators in different states; (4) that the prime farmland provisions of the Act and Section 522's provisions regarding the designation of certain lands as unsuitable for surface mining take private property without just compensation, in violation of the Fifth Amendment; and (5) that the requirement of depositing proposed civil penalties into escrow violates due process.[3]

In due course, a hearing was held on plaintiffs' motion for a preliminary injunction and defendants' motion to dismiss, and pursuant to a stipulation of the parties, the district court ultimately decided the case on the merits without taking further evidence. On June 10, 1980, the court issued an order (App. B, *infra*) and opinion (App. A, *infra*) sustaining plaintiffs' principal challenges to the Act.[4]

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[3] Other issues raised in the complaint dealing with the Fourth Amendment (inspections without warrants), the reclamation fee established by Title IV of the Act, civil penalties, and the National Environmental Policy Act, 42 U.S.C. 4321, *et seq.*, were voluntarily dismissed during the litigation.

[4] We note that the court's opinion consists of "Findings of Fact and Conclusions of Law" adopted *verbatim* from the proposal submitted by plaintiffs.

The court adopted plaintiffs' argument that various sections of Title V of the Act exceed Congress' power under the Commerce Clause (App. A, *infra*, 12a-19a), and held that, in any event, the same provisions of the Act violate the reserved rights of the states under the Tenth Amendment (*id.* at 36a). In particular, the court ruled that the portions of the Act dealing with prime farmlands, restoration of mined lands to the "approximate original contour," replacing topsoil, and postmining land uses are unconstitutional and their enforcement was permanently enjoined (App. B, *infra*, 46a-48a). The district court also concluded that the approximate original contour and prime farmland provisions of the Act violate the Due Process Clause of the Fifth Amendment (App. A, *infra*, 37a-39a). Furthermore, the requirement of restoring the land to equivalent levels of productivity was held to offend the Just Compensation Clause of the Fifth Amendment (*id.* at 40a-42a). The court found another unconstitutional taking in Section 522 of the Act, 30 U.S.C. (Supp. I) 1272, which prohibits surface coal mining within 100 feet of any cemetery or the "outside right-of-way line of any public road," or within 300 feet of any public building, school, church, public park, or occupied dwelling,[5] and establishes procedures for designating lands unsuitable for surface coal mining (App. A, *infra*, 40a-

[5] Section 522(e)(5) provides that the prohibition of surface mining within 300 feet of an occupied dwelling may be waived by the dwelling's owner. Similarly, Section 522(e)(4) permits waivers or adjustments of the prohibition against surface mining within 100 feet of roadways. Furthermore, the prohibitions in Section 522(e) are subject to "valid existing rights" and do not apply to mining operations in existence on the date of the statute's enactment. 44 Fed. Reg. 15342 (1979) (to be codified in 30 C.F.R. 761.3).

42a). Finally, the court struck down as offending procedural due process Section 518(c) of the Act, 30 U.S.C. (Supp. I) 1268(c), which requires persons charged with a violation of the Act to deposit the proposed penalty into escrow (App. A, *infra*, 43a-44a). The judgment entered the same day permanently enjoined enforcement of all the foregoing provisions (App. B, *infra*).

The Secretary filed a notice of appeal to this Court on June 16, 1980 (App. C, *infra*). On June 25, 1980 the district court denied our motion for a stay pending appeal (App. D, *infra*). On July 2, 1980, Mr. Justice Stevens entered an order staying the district court's order pending final disposition of this appeal (App. E, *infra*).

THE QUESTIONS ARE SUBSTANTIAL

The district court's final judgment declared numerous important provisions of the Surface Mining Act unconstitutional and enjoined the Secretary from taking any action to enforce these provisions against surface coal mining operations in the State of Indiana. The district court's far-reaching decision effectively nullified the Surface Mining Act in Indiana. Unless the decision below is reversed by this Court, it will deal a severe blow to the congressional effort to promote interstate commerce and to protect the environment and public health and safety through the effective regulation of surface coal mining.

1. The district court's rulings insofar as they invoke the Tenth Amendment and the Just Compensation Clause of the Fifth Amendment are essentially identical to the decision in *Virginia Surface Mining*. The deficiencies in the court's analysis in this regard have been outlined in the Secretary's Jurisdictional Statement in *Virginia Surface Mining*, 79-1538 J.S.

16-24, and the constitutional questions remain substantial for the reasons stated there. In addition, it is appropriate to observe that this Court has already rejected a Tenth Amendment argument like that adopted by the district courts in the present case and in *Virginia Surface Mining*. Appellees in *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59 (1978), argued that the Price-Anderson Act's limitation on liability arising from a nuclear accident violated the Tenth Amendment because it encroached on "the right of the state to protect its own property and its interest in protecting the lives and dwellings of its inhabitants * * *." 77-262 Appellees' Br. 35. The Court summarily disposed of this contention in a footnote, saying that "[n]othing in *National League of Cities* [v. *Usery*, 426 U.S. 833 (1976),] or in our prior due process cases provides any support for this claim" (438 U.S. at 84 n.27). The district court's invalidation of the Surface Mining Act on Tenth Amendment grounds is similarly unsupportable.

2. The district court's procedural due process ruling with respect to the constitutionality of Section 518(c) of the Surface Mining Act is indistinguishable from the earlier district court decisions on which the present opinion relies, *i.e.*, *Virginia Surface Mining* and *Star Coal*. The correctness of those earlier decisions is now the subject of the Secretary's appeal to this Court in No. 79-1538 and No. 80-49. The civil penalty provisions in Section 518 of the Surface Mining Act are critical to the effective enforcement of the Act's regulatory provisions, and, for the reasons stated in 79-1538 J.S. 31-34, the prepayment feature of those provisions does not violate the Due Process Clause. The district court therefore erred

in ruling Section 518 unconstitutional and enjoining its enforcement.

3. The district court ruled that approximately 20 different subsections in Title V of the Surface Mining Act are unconstitutional because they exceed Congress' power under the Commerce Clause in Article I, Section 8, of the Constitution (App. A, *infra*, 17a-19a). The primary basis of the court's ruling was its finding that surface coal mining operations on prime farmland in Indiana will have a "trivial impact on interstate commerce" (App. A, *infra*, 12a). In addition, the district court concluded (App. A, *infra*, 18a-19a) that the "approximate original contour" provision (Section 515(b)(3), 30 U.S.C. (Supp. I) 1265(b)(3)), the topsoil preservation requirement (Section 515(b)(5), 30 U.S.C. (Supp. I) 1265(b)(5)), and the provisions dealing with the designation of certain areas as unsuitable for surface mining (Sections 522(a), (c), (d) and (e)(4) and (5), 30 U.S.C. (Supp. I) 1272(a), (c), (d), and (e)(4) and (5)) are not directed at the alleviation of water or air pollution (even assuming surface mining may produce such consequences), and in any event, are not means "reasonably and plainly adapted to the legitimate end of removing any substantial adverse effect on interstate commerce" (App. A, *infra*, 17a).

The district court's reasoning is seriously flawed. First, the finding that surface coal mining operations in Indiana will have a "trivial impact on interstate commerce" is beside the point. At least since *Wickard* v. *Filburn*, 317 U.S. 111, 127-128 (1942), and *Polish Alliance* v. *Labor Board*, 322 U.S. 643, 648 (1944), it is the *cumulative potential* effect of uncontrolled surface mining on prime farmlands throughout the Nation that must be considered. See, *e.g.*, *Katzenbach* v. *McClung*, 379 U.S. 294, 300-301

(1964). Further, there is no ground for faulting the congressional judgment that poorly regulated surface coal mining may imperil substantial amounts of agricultural acreage in many states and that this, in turn, will affect interstate commerce in agricultural products. Such congressional judgments as to adverse consequences for interstate commerce are entitled to deference if there is any rational basis for them. *Id.* at 303-304. Here, there is surely a rational basis for concluding that the cumulative effects of uncontrolled surface coal mining on prime farmlands will have significant impact on interstate commerce.[6] The provisions dealing with approximate original contour, topsoil handling, postmining land use, and related matters are rational means of accomplishing one of the Act's primary goals: the reclamation of mined lands to a productive condition that will not contribute to environmental deterioration. See, *e.g.*, H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 93 (1977). Even assuming that, in a particular situation involving a particular piece of land and the application of a particular statutory provision, some serious constitutional question might be presented under the Surface Mining Act, that is no justification for a wholesale invalidation of numerous critical statutory sections on Commerce Clause grounds.

4. The district court also ruled that the Act's prime farmland provisions and the provision requiring restoration to approximate original contour, Section 515(b)(3), 30 U.S.C. (Supp. I) 1265(b)(3), violate the substantive due process and equal protection guarantees of the Fifth Amendment (App. A, *infra*, 37a-39a). According to the court, the lack of

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[6] See, *e.g.*, 123 Cong. Rec. 15720 (1977) (remarks of Sen. Percy).

variance procedures applicable to the prime farmland provisions and the limitation of permissible variances from the approximate original contour requirement in Section 515(b)(3) to mining on mountaintops and steep slopes impermissibly discriminate against operators and states in the Midwest, where there are significant coal reserves located under prime farmland and few or no steep slopes or mountaintops (App. A, *infra*, 37a-38a). In addition, the court held that the prime farmland and approximate original contour provisions themselves are so "irrational, arbitrary and capricious" that they "constitute a deprivation of substantive due process in violation of the Fifth Amendment" (*id.* at 39a).

We challenge that conclusion. Economic legislation such as the Surface Mining Act carries with it a presumption of rationality which can only be overcome by a showing of arbitrariness or irrationality. *Duke Power Co.* v. *Carolina Environmental Study Group, supra*, 438 U.S. at 83; *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). One who would establish that such a congressional enactment is arbitrary or irrational bears an extremely heavy burden. *Vance* v. *Bradley*, 440 U.S. 93, 97, 111 (1979). A court may not substitute its judgment for that of Congress merely because it believes that Congress was "unwise in not choosing a means more precisely related to its primary purpose." *Id.* at 109. Here, the district court's opinion provides no factual or legal basis for concluding that the provisions in question are arbitrary or irrational. The district court failed to mention, and the plaintiffs failed to present, any concrete factual situation where the prime farmland or approximate original contour provisions have been applied to a mining operation so as to cause an irrational result.

Moreover, even assuming *arguendo* that the provisions in question impose a greater burden against operators in midwestern states, that is not a sufficient basis for striking them down as unconstitutional. It is well-established that a claim of arbitrariness or irrationality cannot be founded merely upon a statute's lack of uniform geographic impact. *Secretary of Agriculture* v. *Central Roig Refining Co.*, 338 U.S. 604, 616 (1950); *Currin* v. *Wallace*, 306 U.S. 1, 14 (1939). As this Court explained in *Central Roig Refining* (338 U.S. at 616):

> Nor does the Commerce Clause impose requirements of geographic uniformity. * * * Congress may devise * * * a national policy with due regard for the varying and fluctuating interests of different regions. [Citations omitted.]

The short answer to plaintiffs' discrimination complaint is that the characteristics of surface mining operations vary with geography, and geographical conditions are not the same in all affected states. Congress has determined that measures appropriate for steep-slope mines are not necessarily desirable in prime farmland areas. That is surely a rational distinction for Congress to draw, and the fact that a particular state has more of one kind of mining operation than another does not establish discrimination in violation of the Due Process Clause of the Fifth Amendment.

CONCLUSION

Probable jurisdiction should be noted, and the case should be set for argument in tandem with *Virginia Surface Mining*.

Respectfully submitted.

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AUGUST 1980

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Civil No. IP 78-500-C

STATE OF INDIANA;
OTIS R. BOWEN, M.D., Governor of the
State of Indiana;
JOSEPH D. CLOUD, Director of the
Indiana Department of Natural Resources; and
INDIANA DEPARTMENT OF NATURAL RESOURCES,
PLAINTIFFS

vs.

CECIL D. ANDRUS, as Secretary of the
United States Department of the Interior;
WALTER J. HEINE, as Director of the Office of
Surface Mining Reclamation and Enforcement;
OFFICE OF SURFACE MINING
RECLAMATION AND ENFORCEMENT;
UNITED STATES DEPARTMENT OF THE
INTERIOR; and the
UNITED STATES OF AMERICA, DEFENDANTS

Civil No. IP 78-501-C

INDIANA COAL ASSOCIATION;
MEADOWLARK FARMS, INC.;
AMAX COAL COMPANY, a divison of AMAX INC.;
PEABODY COAL COMPANY; and
JOHN A. CONLON, a resident and citizen of the
State of Indiana, PLAINTIFFS

vs.

THE UNITED STATES OF AMERICA;
THE UNITED STATES DEPARTMENT OF THE INTERIOR;
CECIL D. ANDRUS, as Secretary of the
United States Department of the Interior;
THE OFFICE OF SURFACE MINING
RECLAMATION AND ENFORCEMENT;
and
WALTER J. HEINE, as Director of the Office of
Surface Mining Reclamation and Enforcement;
DEFENDANTS

MEMORANDUM OF DECISION

Plaintiffs in these consolidated actions seek a judgment declaring various portions of the Surface Mining and Control Act of 1977 (the Act), 30 U.S.C. §§ 1201 to 1328, unconstitutional, as well as a permanent injunction preventing enforcement of the challenged provisions by the Secretary of the Interior. The matter came before the Court for a trial on the merits on April 24, 1980, pursuant to joint motion and procedural stipulation by the parties. Defendant's motion to dismiss, taken under advisement at that time, will be treated as a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and is hereby DENIED.

Plaintiffs include AMAX, Inc., through its division AMAX Coal Company, Peabody Coal Company, and members of the Indiana Coal Association, each of whom is an owner or operator of surface coal mines within the State of Indiana, Meadowlark Farms, Inc., which owns interests in realty, some of which are coal interests which it leases to AMAX, Inc., and conducts farming operations and other activities on the reclaimed land, James A. Conlon, a resident and citizen of the State of Indiana, as well as the State

of Indiana, Otis R. Bowen, M.D., its Governor, Joseph D. Cloud, Director of the Indiana Department of Natural Resources which, pursuant to *Ind. Code* § 13-4-6-4 (1976), is responsible for supervising and enforcing the Indiana Strip Mining Reclamation Act, and the Indiana Department of Natural Resources.

Defendant Office of Surface Mining Reclamation and Enforcement, its director, Walter J. Heine, and Cecil D. Andrus, as Secretary of the Department of the Interior, are responsible for administering the Act and enforcing its provisions.

The complaints allege that the challenged provisions exceed the regulatory authority conferred upon the federal government under the Commerce Clause of the United States Constitution and are not reasonably related to the legitimate end of controlling commerce-affected environmental problems, that they are unconstitutional land use control and planning regulations violative of the Tenth Amendment, that they place disproportionate burdens upon surface mining operations, and therefore upon Indiana coal mining, which is almost exclusively of the surface mining variety, and that they constitute a taking of property without just compensation, in violation of due process and Taking Clause requirements of the Fifth Amendment. Specifically, the challenged provisions, all of which are within Title V of the Act, are:

(a) § 507(b)(16) [30 U.S.C. § 1257(b)(16)];

(b) § 701(20) [30 U.S.C. § 1291(20)];

(c) § 508(a)(2), (3), (4), (8) and (10) [30 U.S.C. § 1258(a)(2), (3), (4), (8) and (10)];

(d) § 510(d)(1) [30 U.S.C. § 1260(d)(1)];

(e) § 515(b)(7) [30 U.S.C. § 1265(b)(7)];

(f) § 515(b)(19) [30 U.S.C. § 1265(b)(19)] insofar as that portion which provides ". . . achieve the approved postmining land use plan . . .";

(g) § 515(b)(20) [30 U.S.C. § 1265(b)(20)], as to that portion which provides, "when the regulatory authority approves a long-term intensive agricultural postmining land use" and further that portion "when the regulatory authority issues a written finding approving a long-term, intensive, agricultural postmining land use as part of the mining and reclamation plan . . .;", and any other part which requires any post-mining land use.

(h) § 519(c)(2) [30 U.S.C. § 1269(c)(2)], as to that portion which provides ". . . until soil productivity for prime farm lands has returned to equivalent levels of yield as nonmined land of the same soil type in the surrounding area under equivalent management practices";

(i) § 515(b)(3) [30 U.S.C. § 1265(b)(3)];

(j) § 515(b)(5) [30 U.S.C. § 1265(b)(5)];

(k) § 522(a), (c), (d), (e)(4) and (5) [30 U.S.C. § 1272(a), (c), (d), (e)(4) and (5)]; and

(l) § 510(b)(1) and (2) [30 U.S.C. § 1260 (b)(1) and (2)] to the extent that it requires that a permit application be denied or approved depending on approval of the postmining land use or of any change in postmining land use from the premining land use.

(m) § 518(c) [30 U.S.C. § 1268(c)].

(n) § 508(a)(2)(C) [30 U.S.C. § 1258(a)(2)(C)] as to that portion "the productivity of the land prior to mining, including appropriate classification as prime farm lands, as well as the average yield of food, fiber . . . products . . . obtained under high levels of management;"

(o) § 519(c)(2) [30 U.S.C. § 1269(c)(2)] as to that portion which provides that a bond on prime farmland may not be released "until soil productivity for prime farm lands has returned to equivalent levels of yield as nonmined land of the same soil type in the surrounding area under equivalent management practices . . .".

The challenged provisions constitute the heart of the Act, which was promulgated in 1977 primarily to counteract perceived adverse environmental effects of surface mining operations. *See* 30 U.S.C. § 1201(c). The legislation established a uniform set of mining and reclamation regulations to be implemented by way of conforming state enforcement programs, approval and supervision of which was made the responsibility of the newly-created Office of Surface Mining Reclamation and Enforcement. The Act is effective in two stages. From August 3, 1977 until either a state or federal program is implemented, a limited number of provisions are in effect [§§ 501-504, 30 U.S.C. §§ 1251-541.] This is commonly denoted as the interim phase, during which period the states must issue permits requiring compliance with the interim aspects of the federal Act [§ 502(a) and (b), 30 U.S.C. § 1252(a) and (b)]. Most of Title V becomes effective when either a state

program is approved or a federal program is implemented [§ 504(a), 30 U.S.C. § 1254(a)], and an operator must submit an application with reclamation plans for a permit within two months of the approval of a state program or the implementation of a federal program [§ 502(d), 30 U.S.C. § 1252 (d)]. The Secretary of the Interior has issued regulations for the interim period [republished as 30 C.F.R. §§ 710-725] pursuant to § 501(a) [30 U.S.C. § 1251(a)], and regulations for the formulation, submittal and review process of state programs, as well as for permanent aspects of the Act [30 C.F.R. §§ 700-899], pursuant to § 501(b) [30 U.S.C. § 1251 (b)].

To retain authority over the regulation of surface mining operations and other matters encompassed within the Act, the states must pass laws and regulations for and submit a state program to the Secretary of the Interior [§504, 30 U.S.C. § 1254]. The time for such submission was extended to March 3, 1980, by order of the District Court for the District of Columbia [*In Re Permanent Surface Mining Regulation Litigation*, 13 ERC 1447 and 1586 (1979)] because of the Secretary's delay in promulgating permanent regulations. A state program, including the legislation and regulations for the program, must conform to the Act and to the Secretary's regulations [§ 503(a)(1) and (7), 30 U.S.C. § 1253(a)(1) and (7)]. If the state program is not approved, the Secretary must promulgate a federal program for the state. Permits and enforcement would then be accomplished by the Office of Surface Mining Reclamation and Enforcement, a part of the Department of the Interior.

The Court's jurisdiction in this case is predicated upon 28 U.S.C. §§ 1331, 1337, 2201 and 2202. Standing exists by virtue of the fact that at least one party has standing in regard to each issue. *See California Banker's Association* v. *Schultz*, 416 U.S. 21, 44-46 (1974). Not all of the contested provisions are a part of the currently effective interim program. However, judicial determination as to the validity of various portions of the soon to be effective permanent program, with which any Indiana program must comply, will serve to clarify the extent to which the state program must conform to the Act's particularized requirements, and avoid enactment by the Indiana legislature of unnecessary laws and regulations. There can be no doubt that plaintiffs are currently aggrieved by the provisions being challenged. The Act has necessitated huge expenditures on the part of Indiana surface mine operators, and threatens to destroy Indiana's competitive position as a supplier of coal. Plaintiff AMAX Coal Company in 1978 expended approximately $27,000,000 to purchase equipment required in order to comply with the Act and incurred an additional $8,100,000 in increased operating costs for its four Indiana mines. The figures for 1979 were $6,000,000 for additional equipment and over $8,000,000 in increased operating costs. These figures do not include pollution control costs or blasting expenditures, but rather are limited to costs made necessary by the prime farmland, topsoiling, and approximate original contour requirements of the Act, challenged herein. The huge cost increases have already led AMAX to close one mine just prior to the effective date of the Act's interim program, resulting in the loss of 152 jobs and over 600,000 tons of coal production annually. *See* Plaintiff's Exhibits 9, 10, 29 and 30.

The Court has reviewed the testimony, arguments, exhibits, briefs and relevant caselaw in this cause, and has concluded that, for reasons set out more fully below, various portions of Title V of the Surface Mining Control and Reclamation Act of 1977 exceed Congress' powers under the Commerce Clause, impinge upon the sovereign powers of the State of Indiana in violation of the Tenth Amendment, and contravene due process and Taking Clause provisions of the Fifth Amendment. Accordingly, these provisions must be declared invalid. Plaintiffs have submitted what the Court considers to be a thorough yet concise statement of proposed findings of fact and conclusions of law in this matter. The Court now adopts and sets forth below as its own these findings and conclusions as required by Rule 52 of the Federal Rules of Civil Procedure. An Order and Judgment embodying the Court's conclusions herein will accompany this opinion.

I.

COMMERCE CLAUSE

(A) *Issues*:

Plaintiffs assert that provisions of Title V are attempts by Congress to regulate facets of surface coal mining operations which have no substantial adverse effect on interstate commerce, or that these provisions are not a means reasonably or plainly adapted to any legitimate end permitted by the Constitution under the Commerce Clause, that is, removing substantial adverse effects on interstate commerce.

Under these issues plaintiffs challenge "the prime farmland provisions" which encompass the following sections of Title V:

§ 507(b)(16) [30 U.S.C. § 1257(b)(16)] which requires the applicant to identify in the permit application the location of "prime farmlands" on which surface mining operations are to be conducted, pursuant to the definition of prime farmland as established by the Secretary of Agriculture pursuant to § 701(20) [30 U.S.C. § 1291 (20)];

§ 508(a)(2)(C) [30 U.S.C. § 1258(a)(2)(C)] which requires that the reclamation plan submitted with the application include a statement concerning "the productivity of land prior to mining, including appropriate classification as prime farm lands, as well as the average yield of food, fiber . . . products from such lands obtained under high levels of management . . .;"

§ 510(d)(1) [30 U.S.C. § 1260(d)(1)] which requires that the regulatory authority, before issuing a permit farmland surface mining operations on prime farmland, shall consult with the Secretary of Agriculture, and grant a permit to mine on prime farmland only if the regulatory authority finds that the operator "has the technological capability to restore such mined area . . . to equivalent or higher levels of yield as non-mined prime farmland in the surrounding area under equivalent levels of management and can meet the soil reconstruction standards in Section 515(b)(7) . . .;"

§ 515(b)(7) [30 U.S.C. § 1265(b)(7)] which requires the separate removal and replacement of the A, B and C soil horizons in the instance of prime farmlands;

§ 515(b)(20) [30 U.S.C. § 1265(b)(20)] as to that portion which provides, "when the regulatory authority approves a long-term intensive

agricultural postmining land use", and further that portion "when the regulatory authority issues a written finding approving a long-term, intensive, agricultural postmining land use as part of the mining and reclamation plan . . .", and any other part which requires any postmining land use;

§ 519(c)(2) [30 U.S.C. § 1269(c)(2)] which provides that the bond for mining on prime farmland may not be released "until soil productivity for prime farm lands has returned to equivalent levels of yield as nonmined land of the same soil type in the surrounding area under equivalent management practices. . . ."

[Hereafter the foregoing provisions are referred to as "the prime farmland provisions."]

The plaintiffs under these issues further challenge the approximate original contour requirements of § 515(b)(3) [30 U.S.C. § 1265(b)(3)], the topsoiling requirements of § 515(b)(5) [30 U.S.C. § 1265 (b)(5)], and the areas unsuitable for surface mining provisions § 522(a), (c), (d) and (e)(4) and (5) [30 U.S.C. § 1272(a), (c), (d) and (e)(4) and (5)].

Plaintiffs also challenge those provisions of the Act which combine to require a commitment by an operator to a certain postmining land use, as well as the approval of such postmining land use by the regulatory authority as a condition to the applicant being granted a permit to mine. These provisions are: § 507(d) [30 U.S.C. § 1257(d)] which requires the submission of an acceptable reclamation plan, which must contain information regarding the premining and postmining use, as well as the productivity of land, and those which require a detailing in the plan of how the proposed postmining land

use will be achieved, as well as necessary support activities for the proposed postmining land use, all as contained in § 508(a)(2), (3), (4), (8) and (10) [30 U.S.C. § 1258(a)(2), (3), (4), (8) and (10)]; § 510(b)(1) and (2) [30 U.S.C. § 1260(b)(1) and (2)] which require that a permit application be denied unless all of the application requirements are accurate and complete and that the reclamation requirements including the land use concepts as set forth above, "can be accomplished"; and certain portions of § 515(b)(19) and (20) [30 U.S.C. § 1265 (b)(19) and (20)] which are respectively the "approved postmining land use plan", and 'the regulatory authority approves a long term intensive agricultural postmining land use", and "the regulatory authority issues a written finding approving a long-term, intensive, agricultural postmining land use as part of the mining and reclamation plan. . . ."

The Court's inquiry on the question of whether Congress has properly exercised the Commerce Clause power is a very specific, limited and two-fold inquiry: First, this Court must "determine whether the particular activity [facet of surface mining operations] regulated or prohibited is within the reach of the federal power," *United States* v. *Darby*, 312 U.S. 100, 120-21 (1941), that is, whether there is a rational basis for Congress to conclude that the particular facet of surface mining operations regulated or prohibited has a substantial and adverse effect on interstate commerce. A "trival impact on commerce" may not be used by Congress "as an excuse for broad general regulation of state or private activities," *Maryland* v. *Wirtz*, 392 U.S. 183, 196 n.27 (1968). Second, "the means chosen," that is the form of regulation, must be "reasonably adapted" or "plainly

adapted" to the legitimate end of removing the substantial and adverse effect on interstate commerce. *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 262 (1964), *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

(B) *Findings*:

1. Surface coal mining operations on prime farmland, as distinguished *per se* from any other type of land, have an infinitesimal or trivial impact on interstate commerce. The extent and distribution of prime farmland in the United States was presented to Congress in the form of the *Report Of The Interagency Task Force On The Issue Of A Moratorium Or A Ban On Mining In Prime Agricultural Lands*, prepared by Office of Management and Budget, Soil Conservation Service, Bureau of Mines, Federal Energy Administration, and the Environment Protect Agency (hereinafter the "Report"). The Report was presented with a report entitled *Restoring Soil Productivity On Surface-Mined Land*, Johnson, McCormack and Sampson (1977), which was presented to the House Committee at *Briefing Presentation By The Soil Conservation Service Before The Committee On Interior And Insular Affairs*, U.S. House of Representatives, April 5, 1977. [See 43 Fed. Reg. 41,716 (1978), Part III; Exhibit 3 to Deposition of Neil Sampson (one of the authors).]

2. The legislative history demonstrates that the Report was before Congress, which relied on the Report in enacting the Act. The House Committee Report states as follows:

> The Carter Administration has recommended that a 5-year moratorium be placed on mining on

> prime agricultural lands until studies are conducted to learn if the soil can be returned to its original productivity. . . . Furthermore, *data contained in the report of the Interagency Task Force on the Issue of a Moratorium or a Ban on Mining in Prime Agricultural Lands appears to confirm the view that a moratorium is not justified.* [H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 185 (1977); emphasis added.]

Such Congressional reliance is further shown by the fact that the data set forth in the Report, as well as that presented by Mr. Sampson, was presented to the Senate and printed in the Records. [123 Cong. Rec. S8,105 (daily ed. May 20, 1977).]

3. The Report disclosed the results of a Soil Conservation Service study conducted in 1975 to evaluate the status of the Nation's croplands in 1975 by comparison of the current land use on sample plots with the land use in 1967. It was found that the Nation contains a total of 384,000,000 acres of "prime farmland," of which 250,000,000 acres (or 65%) was used for the production of crops. [See also H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 105-06 (1977).] Approximately 134,000,000 acres of prime farmland was not in cropland use. The study disclosed that an annual average of 1,000,000 acres of prime farmland was converted to urban and water uses during the period 1967 to 1975. Of the 8,000,000 acres of prime farmland lost to such use during that period of time, 6,500,000 acres were converted to urban uses and 1,500,000 acres to water uses, or 80% and 19% respectively. [Report, p. 6, Table 5.]

4. Further studies were conducted based upon the annual production of surface coal mining in the United States in 1977 and its effect on prime farm-

land. The studies showed that approximately 21,800 acres of prime farmland were disturbed by surface mining on an annual basis. This constitutes only 2% of the 1,000,000 acres per year that is irretrievably lost to urban and water use. Further, it constitutes only *six one-thousandths* of one percent [0.006%] of the total prime farmland in the United States. It would take 166 years for surface mining to disturb 1/100 (one one-hundredth) of the total prime farmland in the United States. Therefore, it was determined that the impact of surface mining on the loss of prime farmland was negligible. The Report concluded that even if the entire 21,800 acres of prime farmland affected in 1977 came entirely out of corn production, the yearly effect based on the 1976/1977 crop year would be less than *0.04%*. In comparison, through the Agricultural Stabilization and Conservation Service, the Federal Government is paying farmers *not* to grow crops on 5,900,000 acres. [Plaintiffs' Exhibit 20.] This is 200 times the amount of prime farmland disturbed annually by surface coal mining.

5. The Report concluded that the United States has ample farmland to meet its domestic needs for the foreseeable future. The Report concluded:

> [E]ven assuming a worst case senario [sic] in which the entire 13,800 acres of prime farmland annually affected by surface mining in the Illinois, Indiana, Western Kentucky coal fields were lost permanently to farm production, total acreage losses over a 30 year period would amount to 414,000 acres. Further assuming that the entire impact of the loss would be on corn production, the total production loss in the 30th year would be less than 1% of the national 1976/1977 yields. [Report, p. 21.]

The Report also concluded:

> The United States has ample farmland to meet its domestic needs for the foreseeable future. However, there are some persons who believe that there exists an ethical responsibility to retain as much as possible the existing farmlands of this Nation. In their view there is a humaritarian aspect of this problem and they believe that every acre of prime farmland that goes out of production represents loss of food stocks which could be made available to people in less developed areas of the world. This view generally does not recognize the issues associated with getting the food from the United States to those needy in other countries, e.g., transportation costs, foreign limitations of the less developed countries, and the views of other countries exporting agricultural products. [Report, p. 6.]

6. There are 11,500,000 acres of prime farmland in Indiana. [Affidavit of Dideriksen.] The six major coal producing countries in Indiana (Sullivan, Warrick, Clay, Greene, Pike and Vermillion) produce more than 80% of Indiana's surface mineable coal [Plaintiffs' Exhibit 13], but contribute less than 5% of the annual production of corn, soybeans and wheat in Indiana [Plaintiffs' Exhibit 14]. Only 40,000 acres of prime farmland are projected to be disturbed by surface mining in Indiana in the next 20 years. [Affidavit of Smith.] That amounts to only 3/1,000 (three one-thousandths) of the total prime farmland in Indiana. Throughout all the Corn Belt States, it is projected that only 2/1,000 (two one-thousandths) of the total prime farmland within those states will be disturbed by surface mining in the next 20 years [Reference 1 to Defendants' evidence in opposition to Motion For Preliminary In-

junction]. The Agricultural Stabilization and Conservation Service paid Indiana farmers *not* to grow crops on 369,135 acres in 1977. [Plaintiffs' Exhibit 20.] Thus, the Federal Government is paying Indiana farmers not to farm nearly 1,000% more land than would be affected by surface coal mining in Indiana in the next 20 years.

7. The approximate original contour, topsoiling and prime farmland provisions of the Act are totally unrelated to the enhancement of air and water quality [Tr. 94-97; Plaintiffs' Exhibit 21]. The four identified pollutants are iron, manganese, suspended solids and acidity (pH). [Tr. 94; 30 C.F.R. § 715.17; 30 C.F.R. § 816.42.]

8. Requiring the return of prime farmland to the use of farming in postmining use would actually increase water pollution. One of the more serious problems with respect to water pollution within the State of Indiana is that of sedimentation (or suspended solids) in streams which is caused by farming. [Tr. 96.] Thus, the prime farmland provisions of the Act would increase or cause an adverse effect of surface coal mining operations on water quality.

9. The Report of the 208 Water Quality Program study and analysis [hereinafter "208 Report"] shows that active surface mining in Indiana is not causing any surface water quality problems, and that to the extent that water quality problems exist in Indiana, such problems are caused by land that was reclaimed prior to the 1967 Indiana surface mining reclamation law. [Plaintiffs' Exhibit 45; Defendants' Exhibit in Opposition to Motion for Preliminary Injunction, pp. 216-17.] The report also states that water quality aspects of Indiana mines are presently being controlled by the National Pollution Discharge and

Elimination System Standards of the Clean Water Act which are "a major factor in preventing undesirable pollutants from entering surface waters from active strip mines." [208 Report, p. 217.]

10. Plaintiffs coal companies own and/or have rights to and presently intend to mine lands subject to § 522(e)(4) and/or (5) [30 U.S.C. § 1272(e)(4) and/or (5)]. [See Plaintiffs' Exhibit 33 and deeds and/or leases and maps attached thereto.]

(C) *Conclusions*:

1. "The prime farmland provisions" are directed at facets of surface coal mining which have no substantial and adverse effect on interstate commerce. Similarly, the prime farmland provisions are not related to the removal of air and water pollution and are, therefore, not a means [regulation] reasonably and plainly adapted to the legitimate end of removing any substantial adverse effect on interstate commerce. These sections, to the extent set forth, are not within powers delegated to Congress and are unlawful as being contrary to the Constitution.

2. The water pollutants are being controlled pursuant to § 515(b)(10)] [30 U.S.C. § 1265(b)(10)] of the Act, which requires minimizing disturbances to the prevailing hydrologic balance, and § 515(b)(8) [30 U.S.C. § 1265(b)(8)], which regulates the quality of discharges from permanent water impoundments. The water pollution control aspects of the Act are the requirements for settlement ponds, treatment ponds and that surface drainage or nonpoint sources be controlled, as well as point source discharges under the National Pollution Discharge Elimination System Standards of the Clean Water

Act. Thus, the Act contains entirely separate provisions dealing with water pollution control, that is, separate and apart from the original contour, prime farmland and topsoiling provisions, as well as the other provisions being challenged by plaintiffs. Additional provisions of the Act which are plainly adapted to alleviating air and water pollution are § 515(b)(4) [30 U.S.C. § 1265(b)(4)], which requires stabilization and protection of all surface areas, including spoil piles, to effectively control erosion and air and water pollution; § 515(b)(11) [30 U.S.C. § 1265(b)(11) [30 U.S.C. § 1265(b)(11)], which requires stabilization of mine wastes; § 515 (b)(14) [30 U.S.C. § 1265(b)(14)], which requires that all debris, acid-forming materials, toxic materials or materials constituting a fire hazard are treated or buried and compacted or otherwise disposed of to prevent contamination of ground and surface water; § 515(b)(16) [30 U.S.C. § 1265(b) (16)], which requires that reclamation efforts proceed in an environmentally sound manner and as contemporaneously as practicable with surface coal mining operations; and § 515(b)(19) [30 U.S.C. § 1265(b)(19)], which requires the establishment on all regraded areas and other lands affected of "a diverse, effective, and permanent vegetative cover of the same seasonal variety native to the area . . . and capable of self-regeneration and plant succession. . . ."

3. The approximate original contour provisions [§ 515(b)(3), 30 U.S.C. § 1265(b)(3)], the topsoiling requirements [§ 515(b)(5), 30 U.S.C. § 1265(b) (5)], the areas unsuitable for surface mining provisions [§ 522(a), (c), (d) and (e)(4) and (5), 30

U.S.C. § 1272(a), (c), (d) and (e)(4) and (5)] are not directed at the alleviation of water or air pollution, to the extent there are such effects, and are not means reasonably and plainly adapted to removing any substantial and adverse effect on interstate commerce. These sections are outside the enumerated powers of Congress and are, therefore, unconstitutional and unlawful.

4. Those provisions of the Act which combine to require a commitment by an operator to a certain postmining land use, as well as approval of any changes in postmining land use by a regulatory authority, as a condition to the operator being granted a permit to mine, are unrelated to removing any substantial and adverse effect on interstate commerce; and further, are not means reasonably and plainly adapted to the legitimate end of removing substantial adverse effects on interstate commerce; and are, therefore, unlawful and contrary to the Constitution. These provisions are § 507(d) [30 U.S.C. § 1257 (d)], which requires the submission of an acceptable reclamation plan containing postmining land use consideration requirements as a part of the permit application; § 508(a)(2), (3), (4), (8) and (10) [30 U.S.C. § 1258(a)(2), (3), (4), (8) and (10)], requiring that the reclamation plan must contain information regarding the premining and postmining use and productivity of the land; § 515(b)(19) and (20) [30 U.S.C. § 1265(b)(19) and (20)] to the extent set forth in "the prime farmland provisions", pertaining to approval of the postmining land use; and § 510(b)(1) and (2) [30 U.S.C. § 1260(b)(1) and (2)], to the extent that it requires that a permit application be denied or approved depending on approval of the postmining land use or any change in postmining land use from the premining land use.

II.

TENTH AMENDMENT

(A) *Issues*:

Plaintiffs challenge the same provisions in Title V as set forth above in Part I(A)—Commerce Clause —Issues. Plaintiffs contend these provisions when combined with those provisions of Title V which require that a State submit a State program in full conformity with the Act and the Secretary's regulations [§ 503(a)(1) and (7), 30 U.S.C. § 1253(a)(1) and (7)], or that the Federal Government through the Department of the Interior and OSM will promulgate a Federal program [§ 504, 30 U.S.C. § 1254], constitute displacement, or regulation, or alteration of the operation and structure of traditional or integral governmental functions essential to the sovereignty of the States contrary to the Tenth Amendment. The plaintiffs contend that the provisions challenged are in fact land use control and planning dictates, which also require and limit State governmental structures and procedures in land use control and planning, a traditional or integral governmental function or area of the sovereignty of the States.

The plaintiffs further contend that the land use control and planning policies in these provisions will have significant adverse effects for the State of Indiana, and that since these provisions are not based upon alleviating air or water pollution, when Federal and State interests are balanced, the State interests are paramount.

On the Tenth Amendment issues asserted by the parties, it is clear that the Tenth Amendment is a

limitation upon congressional power under the Commerce Clause. *National League of Cities* v. *Usery*, 426 U.S. 833, 842-43 (1976). This Court's inquiry pursuant to *National League of Cities* is whether the provisions of the Act being attacked are (1) a congressional enactment (in the exercise of commerce clause powers) . . . to displace, regulate or significantly alter (2) the management, structure or operation of (3) a traditional or integral governmental function . . ." of the States. *Ambersbach* v. *City of Cleveland*, 598 F.2d 1033, 1035-36 (6th Cir. 1979) (footnotes omitted). In some situations a balancing of Federal and State interests may be required because the Court in *National League of Cities* left standing *Fry* v. *United States*, 421 U.S. 542 (1975). *See also National League of Cities*, 426 U.S. at 856 (Blackmun, J., concurring), where a balancing approach interpretation is made of the Court's opinion.

(B) *Findings*:

1. As a matter of land use policy and control, it is evident from a review of the area of prime farmland in the State of Indiana as defined by the Secretary of Agriculture that it is for the most part concentrated north of the surface mining coal producing areas in the southwestern Indiana. The six counties in southwestern Indiana which account for 80% of Indiana surface-mined coal account for less than 5% of the total production of agricultural commodities as corn, wheat, and soybeans in the State of Indiana [Plaintiffs' Exhibits 13 and 14]. Also to be noted is that the Agricultural Stabilization and Conservation Service in 1978 paid Indiana farmers not to produce crops on 369,135.9 acres [Plaintiffs' Exhibit 20]. What is "prime farmland" from the standpoint of land use control and planning within the State of

Indiana may well not be prime farmland as established by the Secretary of Agriculture. Moreover, as to the highest and best land use subsequent to mining of prime farmland, it could well not be farming but rather forestry [Plaintiffs' Exhibit 41], or other uses.

2. From a land use control and planning consideration, the requirement that all mined prime farmland be returned to a farm use, at least through the release of bond, will not serve to decrease the loss of prime farmland to urban and water uses. However, if surface mined prime farmland is allowed to be returned to other uses which could well occur because of the suitable time which surface mining presents for a change in the use of land [see H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 94 (1977); Conclusion No. 13, *infra*], such surface mined prime farmland could be converted to industrial, residential or recreational uses and prevent other non-mined prime farmland from being converted to such uses.

3. The coal deposits in Indiana are part of what is known as the Illinois Coal Basin or Eastern Interior Coal Basin. The center of the Basin is in southeastern Illinois. Only the eastern fringe of the basin lies within Indiana. From the center of the Basin in Illinois, which is up to 1,000 feet below the surface, the coal seams rise toward the surface in Indiana. Surface mining takes place along the periphery of the Basin in Indiana. Because of their depth, the coal deposits located in Illinois near the center of the Basin cannot be mined by the surface method. [Plaintiffs' Exhibits 5 and 12.]

4. The portion of the Illinois Coal Basin lying within Indiana is located along the west central border of the State and extends southward to the

southwestern portion of the state. The major portion of such reserves is concentrated in southwest Indiana. [Plaintiffs' Exhibit 1.] Prime farmland in Indiana is dispersed throughout the State, with the major portion being in the northern and central parts of the state; only a small portion of it is in the coal area of southwestern Indiana. [Plaintiffs' Exhibits 2 and 4.] Thus, the vast majority of Indiana's prime farmland is not located coincidentally with the State's surface mineable coal reserves. Nevertheless, nearly all of plaintiffs' permit areas contain some prime farmland, some as much as 100% [Plaintiffs' Exhibits 7 and 8].

5. The major coal producing counties in Indiana are heavily dependent upon the surface coal mining industry for their financial well being, both private and public, and the delivery of their governmental services to the extent that, in one county (Warrick), over 50% of the total county revenues from personal or real property taxes is derived from the land use of the surface coal mining industry. [Plaintiffs' Exhibits 15-19.] Further, the entire Indiana electrical utility industry is inextricably tied to the land use of surface mining. The surface coal mining method accounts for 99% of Indiana's total coal production. Over 83% of Indiana's coal production is sold to Indiana public utilities under long-term coal contracts. [Plaintiffs' Exhibit 6.] Major industry has located in southwest Indiana because of the ready supply of coal, such as the Alcoa operation in Warrick County, which employs over 3,500 persons. [Plaintiffs' Exhibit 11.]

6. The Indiana coal deposits are such that it is not economical at the present time to recover the coal by the underground mining method. Illinois and

Western Kentucky coal seams are thicker and cleaner with better roof and floor conditions for underground mining. In contrast, Indiana seams are thinner, undulatory, erratic and multi-bedded with numerous shale partings. Further, Indiana has a known fault running parallel to the Wabash River with contemporaneous post depositional channels that disrupt coal seams and result in adverse roof conditions. [Plaintiffs' Exhibit 12.] Also, Indiana underground minable deposits are of insufficient size. Approximately 83.8% of the coal produced in Indiana in 1977 was sold to Indiana utilities [Plaintiffs' Exhibit 6] under long-term contracts which generally require large blocks of coal of up to 50,000,000 tons. There are no underground mineable coal deposits of that magnitude in Indiana. [Plaintiffs' Exhibit 12.]

7. The coal reserves in Illinois are significantly more conducive to underground mining methods, than are those in Indiana. While 99% of Indiana's coal is produced by surface mining, over one-half (55% or 33,000,000 tons) of Illinois' annual coal production is produced by underground mining. There is only one underground mine planned in Indiana in the future, while eight new surface mines are planned. In Illinois, however, there are plans for 21 new underground mines and only nine surface mines. [Tr. 116.]

8. With respect to the use of coal in Indiana, which is primarily by Indiana public utilities, a shift has begun from Indiana surface mined coal to Illinois underground mined coal, at least part of which shift is because of the operating costs attributable to the provisions of the Act being challenged. The current delivered cost of Indiana surface mined coal to Indiana utilities is $1.07 per million Btu. The current

delivered cost of Illinois underground mined coal to Indiana utilities is $1.08 per million Btu. [Tr. 107-10; Plaintiffs' Exhibit 37.] In 1981 it is projected that only 28% of the coal required for new coal-fired electrical generators in Indiana will come from Indiana, while 29% will come from Illinois. [Tr. 114; Plaintiffs' Exhibit 38.] The remainder will come from other States, as Kentucky.

9. Thus, the express intent of the Act [see Conclusions, *infra*] to shift surface coal mining operations into underground coal mining operations will be achieved, and surface coal mining land use will probably shift from the State of Indiana into underground mining in Illinois and/or Kentucky. [Tr. 113-14.] As shown by U.S. Department of Energy projections, this shift has already begun [Plaintiffs' Exhibit 38]. These results are even more certain when Findings Nos. 1 and 2, Part IV(A) are considered.

10. Prior to the enactment of the Act, the Indiana Department of Natural Resources, Division of Reclamation had a total staff of approximately nine employees and an annual budget of approximately $236,578. In order to comply with the interim phase requirements of the Act and federal regulations, the State of Indiana was forced to increase the staff and budget of the Division to 29 employees and $587,063 respectively [Plaintiffs' Exhibit 22].

(C) *Conclusions*:

1. The Act [§ 503, 30 U.S.C. § 1253] requires that the States submit a State program conforming with "the requirements of this Act" and "regulations issued by the Secretary pursuant to this Act" [§ 503 (a)(1) and (7), 30 U.S.C. § 1253(a)(1) and (7)],

which program must be approved by the Secretary, or else the Federal Government will promulgate a program for the State [§ 504(a), 30 U.S.C. § 1254(a)]. This Court must view the portions of the Act challenged by the plaintiffs as if the Federal Government were going to administer the Act under a Federal program in Indiana, for if sovereign functions of a State are dictated and confined by the Act under threat of a Federal program, it is not relevant that a State may ultimately "choose" under threat of Federal usurpation of a sovereign function to have a State program, make such decisions, and structure its government accordingly. If the Federal Government does not have the power to directly usurp functions and control the areas of the Act being challenged, then it is equally without the power to indirectly require such to be done by the States under the threat of Federal usurpation. If these provisions are "incapable of standing by themselves, then the provisions of the Act must fall." *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 585-86 (1937); *National League of Cities*, *supra*. The fact that certain of the decisions might be made by the States under a State program is not sufficient. A State program must comport fully with the Act and regulations which contain inherent Federal decisions already made and which require that the States adopt certain governmental structures and procedures, or else have a Federal program. These considerations are apparent on the face of the Indiana Act passed to authorize the executive branch to submit an Indiana program, where the General Assembly [IC 13-4.1-1 *et seq.*] expressed the following:

> Sec. 1. The general assembly finds that:
>
> (1) P.L. 95-87, the federal Surface Mining Control and Reclamation Act of 1977, provides

that the federal government will assume control of the regulation of the surface coal mining operations and reclamation procedures within Indiana unless the state of Indiana enacts laws as specified by the federal act.

(2) The federal act in many parts constitutes an intrusion into land use planning and control, an integral and traditional aspect of the sovereignty of the state of Indiana, its people, and political subdivisions, as well as numerous other state and local governmental functions as reserved to them by the Tenth Amendment of the Constitution of the United States.

* * *

(4) The threat that the federal government will regulate the surface coal mining operations and reclamation procedures, including land use planning and control, if the state of Indiana does not enact the necessary legislation for a state program, is coercive. It makes the overriding consideration whether to prevent further federal encroachment upon and regulation and control of the state, its people, and local industry, rather than what is in the best interest of the people of the state of Indiana, considering local employment opportunities, financing of local government, and the use of local and state natural resources with consideration for the geography and terrain of the area.

(5) The state of Indiana has challenged the federal act in a lawsuit presently pending before the United States District Court for the Southern District of Indiana, Indianapolis Division, entitled . . . .

2. Regardless of whether the required Federal land use policies, the required governmental structures, and the required procedures for implementing

land use control and planning policy decisions under the Act are instituted in Indiana through a federally mandated and confined State program or through a Federal program, the issues are the same. Even if a State program is instituted in Indiana, the Federal Government cannot do indirectly that which is unconstitutional to accomplish directly. In *National League of Cities*, had the Federal Government not legislated that the States pay certain minimum wages to employees which *indirectly* altered the States' choices as to the delivery of certain governmental services to their citizens, but attempted to directly usurp the delivery of these governmental services, it would have been an even clearer violation of the Tenth Amendment. If Indiana does submit a State program, it will have to comport fully with both the Act and the Secretary's regulations, which contain explicit and implicit federal land use control and planning policies and decisions, as well as required State governmental structures and procedures for further land use decisions. This constitutes Federal regulation of the States as States as under *National League of Cities*. If there is no State program, then the Federal Government will directly usurp the functions which would be an even clearer violation of the Tenth Amendment than that which was prohibited in *National League of Cities*.

3. Land use control and planning is a traditional or integral governmental function or area of State sovereignty. This is required because of the very diverse geography, climate, natural resources, population density and economic structures within the various States, and this was expressly recognized by Congress in § 101(f) [30 U.S.C. § 1201(f)] of the Act. Land use control and regulation has historically

always been exercised by State governments. Land use planning and control through zoning laws and their provisions "are peculiarly within the province of state and local legislative authorities." *Warth* v. *Seldin*, 422 U.S. 490, 508 n.18 (1975). It is one of the most severe and restrictive governmental powers, considering its effect on individuals' property and on local governments as cities, counties and States. Land use planning and control most directly affect the people, industry and governmental entities directly connected with the land involved. In many situations it is the presumed local benefit-burden to the land owner and community in question which prevents a Fifth Amendment violation. The broader the public interest which defines that to be protected and the broader the constituency to which public officials must answer, the more diluted and nonexistent are the local "benefits and burdens" on which the use restrictions are legally based. See *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 133 (1978).

4. The "prime farmland" provisions combine to have prime farmland defined by regulations of the Secretary of Agriculture, with an applicant's permit being conditioned upon a commitment to a postmining farm use, and require a postmining farm use at least until the release of the bond, which will not be released until productivity has reached equivalent levels of yield as non-mined prime farmland in the surrounding area under similar levels of management [§ 510(d)(1), 30 U.S.C. § 1260(d)(1), and § 519(c)(2), 30 U.S.C. § 1269(c)(2)].

5. This period of postmining farming in order to achieve levels of productivity before the release of a bond could take up to ten years [§ 515(b)(20), 30

U.S.C. § 1265(b)(20)]. The required level of productivity on prime farmland cannot be returned without a protracted period of farming. See OSM Comments to 30 C.F.R. § 823.15, wherein it is stated:

> According to Grandt (1978, p. 65) approximately 5 years' growth of deep-rooted legumes, such as alfalfa and grasses, on sites where the topsoil has been replaced should help restore the soil quality for cropland uses. . . . To ensure minimum delay in restoring the productive capacity of prime farmland, a 10-year limit has been placed on the time which can elapse between soil replacement and the initiation of the [3-year] performance test for revegetation success. [44 Fed. Reg. 15,287 (1979).]

6. These "prime farmland provisions" are *per se* land use control and planning decisions which will be implemented in Indiana either by a State program which cannot vary these provisions, or by a Federal program.

7. The expressions of the congressional leaders at the time of the introduction of the prime farmland provisions demonstrate the intent that such land should be returned to a use of farming and that this is explicitly required on the face of the prime farmland provisions. Senator Percy stated from the floor at the time of the introduction:

> For the first time, the Federal Government would be taking into account that these prime agricultural lands are an invaluable resource to us, and we cannot simply pave over them, we cannot simply urbanize them all—and we simply cannot strip mine them, *unless we assure ourselves that all prime lands that are mined will be returned to their original use and their original level of productivity.* [123 Cong. Rec. S8,105 (daily ed. May 20, 1977); emphasis added.]

8. This was also stated as the reason for the absence of a variance provision for prime farmland. Senator Culver stated:

> Under the current bill the language states that an applicant for a new permit to strip mine must demonstrate that he can restore the land affected to a condition at least fully capable of supporting the uses which it was capable of supporting prior to any mining, or higher or better uses.
>
> It is true, as the floor manager of the bill suggests, that implicit in this is that a reasonable person may interpret it, and so construe it, that a restoration to *prime agricultural land use would be a minimal essentiality under that language. But that caveat of a higher or better use is the hooker. That is the loophole you can drive a truck through.* I shall tell why.
>
> The effect of this amendment is to set a standard for reclamation of prime farm lands. Without this amendment, someone in the short term can determine that a better use is a recreational use; a better use is a residential use; a higher use is an industrial use. *We are giving all that discretionary authority to some bureaucrat.*
>
> *I do not want to do that. . . .* [123 Cong. Rec. S8,111 (daily ed. May 20, 1977); emphasis added.]

9. The absence of variance provisions from the prime farmland provisions, and from the topsoil and the approximate original contour provisions, at least as meaningful to Indiana, demonstrates the postmining land use control and planning aspects of these provisions. While in other provisions which are applicable only to other parts of the country, i.e., mountaintops and steep slopes [§ 515(c) and (e), 30

U.S.C. § 1265(c) and (e)], variances have been provided based on "equal or better economic or public use of the affected land, as compared with premining use." The prime farmland, original contour and topsoiling provisions as applicable in the Midwest have no meaningful variances. Implicit is that there is no higher and better postmining land use than is provided by the prime farmland, approximate original contour and topsoiling provisions in Indiana. This was the express congressional intent of disallowing variances as set forth in the Senate Report on the bill that evolved into the Surface Mining Act:

> [T]he Committee did recognize that there are some valid and important reasons for allowing limited variances to prescribed standards of the bill, where such variances provide equal or better protection to the environment, *and result in a higher postmining land use.* [S. Rep. No. 95-128, 95th Cong., 1st Sess. 55 (1977); emphasis added.]

10. In commenting on the variance allowable from the approximate original contour in mining on steep slopes, it was stated:

> [T]he technology of reclamation has come a long way. If the law is framed wisely and reasonably —without rigid contour requirements—there is no reason why further beneficial land uses cannot be carried out on reclaimed land. . . .
>
> * * *
>
> It must be borne in mind that protection of environmental values does not in every instance require return to an original contour. [123 Cong. Rec. S8,101 (daily ed. May 20, 1977) (remarks of Senator Byrd).]

Thus, it is clear that the approximate original contour provision was enacted by Congress based upon land use considerations, and that the failure to provide such variances on prime farmland within the Midwest is a Federal land use decision that no higher or better use exists for such land.

11. The Act as applied in Indiana which contains no steep slopes and will not allow the State to make any variance in its program, nor will a Federal program have any variances, from the prime farmland or approximate original contour requirements or topsoiling requirements due to the express land use planning policy decisions of the Federal Government.

12. Other provisions require, as a condition to granting a permit to surface mine, that the regulatory authority approve changes in the postmining land use. Provisions of the Act also require that a proposed postmining land use differing from a premining land use be approved by a regulatory authority which either directly mandate state governmental structures or usurp the function in land use planning and control policy. See Part I(C), Conclusion No. 4 setting forth this effect from § 507(d) [30 U.S.C. § 1257(d)], § 508(a)(2), (3), (4), (8) and (10) [30 U.S.C. § 1258(a)(2), (3), (4) (8) and (10)], § 515(b)(19) and (20) [30 U.S.C. § 1265 (b)(19) and (20)], and § 510(b)(1) and (2) [30 U.S.C. § 1260(b)(1) and (2)]. These provisions resulted in the Secretary's regulations [30 C.F.R. § 816.133] and the definition of "land use" in 30 C.F.R. § 701.5, which categorizes the various land uses and delineates that a change of the postmining land use from one of the categories set forth to another "shall be considered as a change to an alternative land use which is subject to approval by the regulatory authority."

13. The Congressional intent to regulate the use of land is shown in the legislative history, such as the following:

> [T]he permit process requires the submission and *approval* of postmining land use and thus is designed to elicit an evaluation of the operator's plan and ability to return the land to a useful condition. . . .
>
> . . . [S]urface mining also presents possible land planning benefits as such mining involves the opportunity to reshape the land surface to a form and condition more suitable to man's uses. [H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 93-94 (1977); emphasis added.]

14. It is self-evident on the face of the provisions concerning areas unsuitable for surface coal mining [§ 522, 30 U.S.C. § 1272] that it is directed solely at land use planning and control considerations through required government structures. Further, § 522(e)(4) [30 U.S.C. § 1272(e)(4)] mandates changes or a Federal usurpation of Indiana County Commissioners' or the State Highway Department's authority to regulate county and state road relocations and closings.

15. That the foregoing provisions are directed primarily at land use control and planning policies is further evident from the fact that they are not related to control of air or water pollution as previously found by the Court. Additionally, in the instance of the prime farmland provisions, the use of farming is in fact a major contributor to water pollution by sedimentation.

16. The foregoing provisions require explicit governmental procedures and structures for land use planning and control, and contain explicit land use

judgments which will either be implemented through direct Federal usurpation in a Federal program or mandated upon States to be contained within a State program, and constitute displacement, regulation and altering of the management structure and operation of the traditional area of State sovereignty or integral governmental function of land use planning and control. The foregoing provisions are, therefore, contrary to the Tenth Amendment.

17. All of the above provisions are part of a Federal land use policy of making surface mining an unpreferred land use to underground mining as well as farming, which is expressly set forth on the face of the Act in § 101(b) [30 U.S.C. § 1201(b)], § 102 (c) [30 U.S.C. § 1202(c)], 102(k) [30 U.S.C. § 1202 (k)], and § 522[30 U.S.C. § 1272], as well as in § 515(b)(12) [30 U.S.C. § 1265(b)(12)], which prohibits surface mining near underground mining regardless of prior rights questions. The Interagency Task Force Report establishes that the original prime farmland provisions were based on the assumption that sufficient coal existed which could be mined by the underground method so that surface coal mining was unnecessary. The Report found these provisions were based on "two studies on the effects of surface mining on prime farmlands in Illinois, one of which was funded by the Department of Health, Education, and Welfare, and the other conducted by Jack Doyle of the Environmental Policy Center" [Report, p. 17], which studies indicated:

> So long as there are deep mineable coal reserves in the quantities found in Illinois, there is no need to gamble away long term productive agricultural capacity at the hand of short-term mining economies. [Report, p. 17.]

18. This policy is a land use control and planning policy which when combined with the express functions of the provisions set forth above makes it even clearer that these provisions are a displacement or regulation of the management structure and operation of the traditional governmental function of the States in the area of land use control and planning and are, therefore, contrary to the Tenth Amendment.

19. Under any balancing requirement, the State interest is paramount. The water pollution control provisions are unaffected. Any adverse substantial effect on interstate commerce which is alleviated by the foregoing provisions is trivial at best, while the harmful effects on land use control and planning for Indiana, as well as the extent of the intrusion, are great.

III.

SUBSTANTIVE DUE PROCESS

(A) *Issues*:

Plaintiffs challenge "the prime farmland provisions" and approximate original contour provision [§ 515(b)(3), 30 U.S.C. § 1265(b)(3)] as violating the due process and equal protection guarantees of the Fifth Amendment. Plaintiffs contend that the absence of variances for the prime farmland provisions, and the absence of variances for the approximate original contour provisions for lands within the Midwest, and Indiana in particular, as are provided for mining on steep slopes and mountaintops, constitutes discriminatory, arbitrary, and irrational treatment in violation of the Fifth Amendment, in that

there is no legitimate Federal or national interest to be served by or to justify the lack of variances.

The Court's inquiry with respect to the discriminatory or selective nature of the foregoing provisions is whether there is an overriding national interest which justifies the discriminatory treatment, and whether there is a legitimate basis for presuming that the selectivity in application of the provisions is actually intended to serve that interest. *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 100, 103 (1976). The Court must further determine whether the lack of variances for land within Indiana and the Midwest is rational in light of the purported constitutional end—the alleviation of air or water pollution.

(B) *Findings:*

1. Indiana does not contain mountaintops or steep slopes.

2-3. Findings No. 1 and 2, Part II, are incorporated by reference.

4. The prime farmland and approximate original contour requirements become senseless and tantamount to economic waste where they are not necessary to a postmining land use—as commercial and industrial purposes, residential or housing purposes, or recreational purposes.

(C) *Conclusions:*

1. The lack of variance procedures to the prime farmland provisions, and the limitation of the variance from the approximate original contour requirement [§ 515(b)(3), 30 U.S.C. § 1265(b)(3)] to mining on mountaintops and steep slopes, discriminate against the mining operators and States, as Indiana, within the Midwest which have significant coal re-

serves under prime farmland and no or few steep slopes or mountaintops.

2. There is no rational basis to support that the discriminatory treatment toward plaintiffs and the States in the Midwest, or that the failure to grant plaintiffs equal variances, furthers a legitimate "national interest." For selective or discriminatory Federal legislation to be valid under the Fifth Amendment, there must be an overriding national interest justifying such difference in treatment, and there must be "a legitimate basis for presuming that the rule was actually intended to serve that interest." *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 100, 103 (1976). Furthermore, for the provisions to be a lawful exercise of the Commerce Clause power, the rational basis for the discriminatory treatment must be justified by a "substantial and adverse effect on interstate commerce".

3. There is no overriding national interest justifying the lack of variances for the prime farmland and approximate original contour provisions on lands within the Midwest, and particularly Indiana, so as to justify the discriminatory treatment imposed upon plaintiffs and the State of Indiana. The variances provided for the approximate original contour provisions in the case of mining on steep slopes and mountaintops were based upon land use considerations and not on matters related to air or water quality. The failure to provide for such variances in the Midwest, including variances for the prime farmland provisions, demonstrates that Congress considered there to be no higher or better use for lands within the Midwest which is not, however, an overriding national interest, particularly since the regulation of the use of lands within the States is not a legitimate federal interest in the face of the Tenth Amendment.

4. In addition, the prime farmland and approximate original contour provisions are irrational, arbitrary and capricious requirements in situations where they are not reasonably necessary to achieve a particular postmining use—as where the land will be used for commercial and industrial purposes, residential or housing purposes, or recreational purposes. Therefore, the prime farmland and approximate original contour provisions constitute a deprivation of substantive due process in violation of the Fifth Amendment.

IV.

TAKING WITHOUT JUST COMPENSATION

(A) *Issues:*

Plaintiff coal companies challenge § 510(d)(1) [30 U.S.C. § 1260(d)(1)] and § 519(c)(2) [30 U.S.C. § 1269(c)(2)] which require that to obtain a permit an operator must demonstrate that he has the "technological capability to restore such mined area, within a reasonable time, to equivalent or higher levels of yield as non-mined prime farmland in the surrounding area under equivalent levels of management . . .," and the bond may not be released on prime farmland until "soil productivity . . . has returned to equivalent levels of yield as non-mined land of the same soil type in the surrounding area under equivalent management practices. . . ." Plaintiffs also challenge § 508(a)(2)(C) [30 U.S.C. § 1258(a)(2)(C)] which requires that the premining productivity of the land under high levels of management be set forth as a target level of yield in the reclamation plan. Plaintiff coal companies contend that under the state of the art it is scientifically and technologi-

cally impossible to return surface mined prime farmland to equivalent levels of yield where the level of management practice is a "high level of management practice," and therefore, they will be unable to mine coal and their property will be taken without just compensation contrary to the Fifth Amendment taking clause.

Plaintiff coal companies contend that § 522 [30 U.S.C. § 1272], dealing with areas unsuitable for surface mining whereby surface mining could be prevented pursuant to subsections (a), (c) and (d), and, further, where surface mining and surface mining operations are prevented pursuant to § 522 (e)(4) and (5) [30 U.S.C. § 1272(e)(4) and (5)], constitute a taking of their property without just compensation in violation of the Fifth Amendment taking clause.

(B) *Findings*:

1. There are no known studies conducted by agricultural schools or other published scientific data which demonstrate that, using the required methods of reclamation for prime farmland, prior levels of yield under high levels of management can be achieved. [Tr. 58.]

2. The research and studies conducted to date demonstrate that, at best, prior productivity can be achieved only under basic levels of management. The difference between productivity under basic levels of management and high levels of management is approximately one-third. [Tr. 61.] That is, yields obtained under high levels of management are approximately one-third greater than those obtained under basic levels of management.

3. Plaintiff AMAX Coal Company intends to mine on prime farmland in the immediate future. [Plaintiffs' Exhibits 33 and 34.] On each of these pieces of property, plaintiff AMAX Coal Company owns only the coal; it does not own the surface rights. Therefore, unless plaintiff AMAX Coal Company is permitted to mine the prime farmland, it will be deprived of mining the coal which is the only value of the coal, and the sole interest of said plaintiff in the property will be taken. Neither plaintiffs nor any other mine operators can demonstrate that prime farmland can be restored to prior levels of productivity under high levels of management.

(C) *Conclusions*:

1. In mining on prime farmland, the Act requires that such land be reclaimed and restored to equivalent levels of productivity under "high levels of management," at least where such level is the practice in the surrounding area.

2. The Court having concluded as a matter of fact that it is technologically impossible to reclaim prime farmland in a postmining period so that equal or higher levels of yield under high levels of management practice can be achieved, the coal companies will be prevented from mining coal under such land. Coal in Indiana can be owned as a mineral interest and if coal cannot be removed, the mineral interest is destroyed. *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922).

3. Similarly, § 522(a), (c) and (d) [30 U.S.C. § 1272(a), (c) and (d)] provide a procedure to prevent the removal of coal thereby destroying the mineral interest.

4. Sections 522(e)(4) and (5) [30 U.S.C. § 1272 (e)(4) and (5)] prohibit the removal of coal and any other activity related to surface coal mining operations in certain areas, again destroying the mineral interest and owner's rights.

5. These sections of the Act do not provide for just compensation through eminent domain proceedings. *Pennsylvania Coal Co., supra.* These sections of the Act are, therefore, contrary to the taking clause of the Fifth Amendment and are unlawful and contrary to the Constitution of the United States.

V.

PROCEDURAL DUE PROCESS

(A) *Issues*:

Plaintiffs challenge the constitutionality of § 518(c) [30 U.S.C. § 1268(c)] of the Act, which requires persons charged with a violation of the Act, regulations or permit condition to prepay the full amount of the proposed penalty for such alleged violation as a condition precedent to contesting either the fact of the violation or the amount of the proposed penalty. Plaintiffs contend that such forced prepayment of penalty violates the procedural due process requirement of the Fifth Amendment.

The Court's inquiry is whether persons charged with a violation of the Act, regulations or permit condition are afforded a prior opportunity to be heard before their property (the proposed monetary penalty) is taken from them. *Fuentes* v. *Shevin*, 407 U.S. 67, 96 (1972). If such is not the case, the Court must further inquire as to whether there is a valid governmental interest that justifies postponing

the hearing until after such property is taken. *See Boddie* v. *Connecticut*, 401 U.S. 371, 378-79 (1971).

(C) *Conclusions*:

1. Section 518 [30 U.S.C. § 1268] of the Act provides for the assessment of civil penalties against any mining operator who violates any permit condition or provision of the Act or regulations, which penalties can be as much as $5,000 per day for each such violation. Pursuant to § 518(c) [30 U.S.C. § 1268(c)], any operator charged with a penalty may contest either the amount of the penalty or the fact of a violation only by prepaying in full the amount of the proposed penalty. The failure to prepay such amount results in a waiver of all legal rights to contest the violation or the amount of the penalty.

2. All district courts which have addressed the issue have held that § 518(c) [30 U.S.C. § 1268(c)] violates the procedural due process guarantees of the Fifth Amendment. *See Virginia Surface Mining and Reclamation Ass'n, Inc.* v. *Andrus*, No. 78-0224-B (W.D.Va. Jan. 3, 1980), slip op. at 37-38; *Star Coal Co.* v. *Andrus*, No. 79-171-2 (S.D.Iowa Feb. 13, 1980), slip op. at 19 (hearing on motion for preliminary injunction).

3. Section 518(c) [30 U.S.C. § 1268(c)] of the Act violates the due process clause of the Fifth Amendment contrary to *Fuentes* v. *Shevin*, 407 U.S. 67 (1972). In the situations encompassed by § 518(c) [30 U.S.C. § 1268(c)], there are no extraordinary circumstances with a valid governmental interest at stake so as to justify the requirement of prepaying the full amount of the proposed penalty in escrow in order to be entitled to a hearing on the fact of a

violation or the amount of the proposed penalty, or to justify the requirement that the failure to prepay such amount in full constitutes a waiver of all legal rights to contest the same. *See Boddie* v. *Connecticut*, 401 U.S. 371, 378-79 (1971).

4. The administrative procedure providing for an informal conference before the assessment of the proposed penalty [30 C.F.R. § 845.17-18] is insufficient to cure the constitutional infirmity of § 518(c) [30 U.S.C. § 1268(c)].

DATED this 10th day of June, 1980.

JAMES E. NOLAND
U.S. District Judge
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Civil No. IP 78-500-C

STATE OF INDIANA;
OTIS R. BOWEN, M.D., Governor of the
State of Indiana;
JOSEPH D. CLOUD, Director of the
Indiana Department of Natural Resources; and
INDIANA DEPARTMENT OF NATURAL RESOURCES,
PLAINTIFFS

vs.

CECIL D. ANDRUS, as Secretary of the United States
Department of the Interior;
WALTER J. HEINE, as Director of the Office of
Surface Mining Reclamation and Enforcement;
OFFICE OF SURFACE MINING
RECLAMATION AND ENFORCEMENT;
UNITED STATES DEPARTMENT OF THE INTERIOR;
and the UNITED STATES OF AMERICA, DEFENDANTS

Civil No. IP 78-501-C

INDIANA COAL ASSOCIATION;
MEADOWLARK FARM, INC.;
AMAX COAL COMPANY, a division of AMAX INC.;
PEABODY COAL COMPANY; and
JOHN A. CONLON, a resident and citizen of
the State of Indiana, PLAINTIFFS

vs.

THE UNITED STATES OF AMERICA;
THE UNITED STATES DEPARTMENT OF THE INTERIOR;
CECIL D. ANDRUS, as Secretary of the United States Department of the Interior;
THE OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT;
and
WALTER J. HEINE, as Director of the Office of Surface Mining Reclamation and Enforcement,
DEFENDANTS

ORDER AND JUDGMENT

This Court having previously made its Findings of Fact and Conclusions of Law, the Court now renders its judgment.

IT IS HEREBY ORDERED, ADJUDGED AND DECLARED that:

1. The following provisions of the 1977 Surface Mining Control and Reclamation Act, P.L. 95-87, 30 U.S.C. §§ 1201 *et seq.* [hereinafter the Act] are not within any powers delegated to Congress pursuant to the Constitution of the United States and are therefore unlawful as being contrary to the Constitution, and such provisions are contrary to the Tenth Amendment, even if they are an exercise of the Commerce Clause power, and are, therefore, further unlawful as contrary to the Constitution:

(a) § 507(b)(16) [30 U.S.C. § 1257(b)(16)];

(b) § 701(20) [30 U.S.C. § 1291(20)];

(c) § 508(a)(2), (3), (4), (8) and 10)[30 U.S.C. § 1258(a)(2), (3), (4), (8) and (10)];

(d) § 510(d)(1) [30 U.S.C. § 1260(d)(1)];

(e) § 515(b)(7) [30 U.S.C. § 1265(b)(7)];

(f) § 515(b)(19) [30 U.S.C. § 1265(b)(19)] insofar as that portion which provides ". . . achieve the approved postmining land use plan . . .";

(g) § 515(b)(20) [30 U.S.C. § 1265(b) (20)], as to that portion which provides, "when the regulatory authority approves a long-term intensive agricultural postmining land use" and further that portion "when the regulatory authority issues a written finding approving a long-term, intensive, agricultural postmining land use as part of the mining and reclamation plan . . .;", and any other part which requires any post-mining land use.

(h) § 519(c)(2) [30 U.S.C. § 1269(c)(2)], as to that portion which provides ". . . until soil productivity for prime farm lands has returned to equivalent levels of yield as nonmined land of the same soil type in the surrounding area under equivalent management practices";

(i) § 515(b)(3) [30 U.S.C. § 1265(b)(3)];

(j) § 515(b)(5) [30 U.S.C. § 1265(b)(5)];

(k) § 522(a), (c), (d), (e)(4) and (5) [30 U.S.C. § 1272(a), (c), (d), (e)(4) and (5)]; and

(l) § 510(b)(1) and (2) [30 U.S.C. § 1260 (b)(1) and (2)] to the extent that it requires that a permit application be denied or approved depending on approval of the postmining land use or of any change in

postmining land use from the premining land use.

2. The following provisions of the Act are contrary to the procedural and substantive requirements, including equal protection aspects, of the Due Process Clause of the Fifth Amendment:

(a) The provisions of the Act in Paragraph 1(a) through (h) hereof;

(b) § 515(b)(3) [30 U.S.C. § 1265(b)(3)]; and

(c) § 518(c) [30 U.S.C. § 1268(c)].

3. The following provisions of the Act are contrary to the Taking Clause of the Fifth Amendment:

(a) § 510(d)(1) [30 U.S.C. § 1260(d)(1)];

(b) § 508(a)(2)(C) [30 U.S.C. § 1258(a)(2)(C)] as to that portion "the productivity of the land prior to mining, including appropriate classification as prime farm lands, as well as the average yield of food, fiber . . . products . . . obtained under high levels of management;"

(c) § 519(c)(2) [30 U.S.C. § 1269(c)(2)] as to that portion which provides that a bond on prime farmland may not be released "until soil productivity for prime farm lands has returned to equivalent levels of yield as nonmined land of the same soil type in the surrounding area under equivalent management practices . . ."; and

(d) § 522(a), (c), (d), (e)(4) and (5) [30 U.S.C. § 1272(a), (c), (d), (e)(4) and (5)].

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Secretary of the Department of the Interior and the Director of the Office of Surface Mining Reclamation and Enforcement are hereby enjoined from taking any measures to enforce or give any effect to the provisions of the Act set forth in Paragraphs 1, 2, or 3 hereof, including but not limited to enforcement, the promulgation of regulations, approval or disapproval of State programs, promulgation or implementation of a Federal program, or denying or withholding funds or grants which measures or actions are taken under sections of the Act not set forth in this Judgment, but which measures or actions are based in whole or in part on the sections of the Act set forth in Paragraphs 1, 2, or 3 hereof.

ALL OF WHICH IS ORDERED, ADJUDGED AND DECREED by the Court this 10th day of June, 1980.

JAMES E. NOLAND
U.S. District Judge
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Civil No. IP 78-500-C

STATE OF INDIANA, ET AL., PLAINTIFFS

v.

CECIL D. ANDRUS, ET AL., DEFENDANTS

Civil No. IP 78-501-C

INDIANA COAL ASSOCIATION, ET AL., PLAINTIFFS

v.

DEPARTMENT OF THE INTERIOR, ET AL.,
DEFENDANTS

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the federal defendants appeal to the Supreme Court of the United States from the final order and judgment entered in this action on June 10, 1980.

The appeal is taken pursuant to 28 U.S.C. 1252 and 2101.

Respectfully submitted,

VIRGINIA DILL MCCARTY
United States Attorney
HAROLD R. BICKHAM
Assistant United States Attorney

ALFRED T. GHIORZI
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P.O. Box 7415
Washington, D.C. 20044

DATED: June 16, 1980

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

No. P 78-500-C

STATE OF INDIANA, ET AL.

vs.

CECIL D. ANDRUS, ET AL.

No. IP 78-501-C

INDIANA COAL ASSOCIATION, ET AL.

vs.

DEPARTMENT OF INTERIOR, ET AL.

ENTRY DENYING APPLICATION FOR A STAY OF ORDER

This matter is before the Court upon the application of counsel for the federal defendants in the above entitled cause of action requesting an order staying enforcement of the final order entered by the Court on June 10, 1980, counsel for the plaintiffs having responded with a brief in opposition to the requested stay. Whereupon the Court, having examined the motion and briefs filed in support thereof and opposition thereto, and having concluded that a stay is not merited under the present circumstances,

hereby DENIES the motion for a stay pending appeal.

IT IS SO ORDERED.
DATED this 25th day of June, 1980.

JAMES E. NOLAND
U.S. District Judge

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-1179

CECIL D. ANDRUS, Secretary of the Interior, ET AL., APPELLANTS

v.

INDIANA, ET AL.

ORDER

UPON CONSIDERATION of the application of the Solicitor General and the opposition filed thereto,

IT IS ORDERED that the judgment of the United States District Court for the Southern District of Indiana, Nos. IP 78-500-C and IP 78-501-C, entered June 10, 1980, be, and the same is hereby, stayed pending the filing and disposition of the appeal by this Court.

/s/ John Paul Stevens
JOHN PAUL STEVENS
Associate Justice of the
Supreme Court of the
United States

Dated this 2nd day of July, 1980.

APPENDIX F

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, of the United States Constitution provides in pertinent part:

> The Congress shall have Power To * * * regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; * * * And To make all Laws which shall be necessary and proper for carrying into Execution that foregoing Powers * * *.

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Tenth Amendment to the Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Section 507(b) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. I) 1257 (b), provides in pertinent part:

> The permit application shall be submitted in a manner satisfactory to the regulatory authority and shall contain, among other things—
>
> * * * *
>
> (16) for those lands in the permit application which a reconnaisance inspection suggests may

be prime farm lands, a soil survey shall be made or obtained according to standards established by the Secretary of Agriculture in order to confirm the exact location of such prime farm lands, if any * * *.

Section 508(a) of the Surface Mining Act, 30 U.S.C. (Supp. I) 1258(a), provides in pertinent part:

> Each reclamation plan submitted as part of a permit application pursuant to any approved State program or a Federal program under the provisions of this chapter shall include, in the degree of detail necessary to demonstrate that reclamation required by the State or Fedearl program can be accomplished, a statement of:
>
> * * * * *
>
> (2) the condition of the land to be covered by the permit prior to any mining including:
>
> (A) the uses existing at the time of the application, and if the land has a history of previous mining, the uses which preceded any mining; and
>
> (B) the capability of the land prior to any mining to support a variety of uses giving consideration to soil and foundation characteristics, topography, and vegetative cover, and, if applicable, a soil survey prepared pursuant to section 1257(b)(16) of this title; and
>
> (C) the productivity of the land prior to mining, including appropriate classification as prime farm lands, as well as the average yield of food, fiber, forage, or wood products from such lands obtained under high levels of management;

(3) the use which is proposed to be made of the land following reclamation, including a discussion of the utility and capacity of the reclaimed land to support a variety of alternative uses and the relationship of such use to existing land use policies and plans, and the comments of any owner of the surface, State and local governments or agencies thereof which would have to initiate, implement, approve or authorize the proposed use of the land following reclamation;

(4) a detailed description of how the proposed postmining land use is to be achieved and the necessary support activities which may be needed to achieve the proposed land use;

* * * * *

(8) the consideration which has been given to making the surface mining and reclamation operations consistent with surface owner plans, and applicable State and local land use plans and programs;

* * * * *

(10) the consideration which has been given to developing the reclamation plan in a manner consistent with local physical environmental, and climatological conditions * * *.

Section 510 of the Surface Mining Act, 30 U.S.C. (Supp. I) 1260, provides in pertinent part:

(b) No permit or revision application shall be approved unless the application affirmatively demonstrates and the regulatory authority finds in writing on the basis of the information set forth in the application or from information otherwise available which will be documented in the approval, and made available to the applicant, that—

(1) the permit application is accurate and complete and that all the requirements of this chapter and the State or Federal program have been complied with;

(2) the applicant has demonstrated that reclamation as required by this chapter and the State or Federal program can be accomplished under the reclamation plan contained in the permit application;

* * * * *

(d)(1) In addition to finding the application in compliance with subsection (b) of this section, if the area proposed to be mined contains prime farmland pursuant to section 1257(b)(16) of this title, the regulatory authority shall, after consultation with the Secretary of Agriculture, and pursuant to regulations issued hereunder by the Secretary of Interior with the concurrence of the Secretary of Agriculture, grant a permit to mine on prime farmland if the regulatory authority finds in writing that the operator has the technological capability to restore such mined area, within a reasonable time, to equivalent or higher levels of yield as non-mined prime farmland in the surrounding area under equivalent levels of management and can meet the soil reconstruction standards in section 1265(b)(7) of this title. Except for compliance with subsection (b) of this section, the requirements of this paragraph (1) shall apply to all permits issued after August 3, 1977.

Section 515(b) of the Surface Mining Act, 30 U.S.C. (Supp. I) 1265(b), provides in pertinent part:

General performance standards shall be applicable to all surface coal mining and reclama-

tion operations and shall require the operation as a minimum to—

* * * *

(3) except as provided in subsection (c) of this section with respect to all surface coal mining operations backfill, compact (where advisable to insure stability or to prevent leaching of toxic materials), and grade in order to restore the approximate original contour of the land with all highwalls, spoil piles, and depressions eliminated (unless small depressions are needed in order to retaain moisture to assist revegetation or as otherwise authorized pursuant to this chapter): *Provided, however,* That in surface coal mining which is carried out at the same location over a substantial period of time where the operation transects the coal deposit, and the thickness of the coal deposits relative to the volume of the overburden is large and where the operator demonstrates that the overburden and other spoil and waste materials at a particular point in the permit area or otherwise available from the entire permit area is insufficient, giving due consideration to volumetric expansion, to restore the approximate original contour, the operator, at a minimum, shall backfill, grade, and compact (where advisable) using all available overburden and other spoil and waste materials to attain the lowest practicable grade but not more than the angle of repose, to provide adequate drainage and to cover all acid-forming and other toxic materials, in order to achieve an ecologically sound land use compatible with the surrounding region: *And provided further,* That in surface coal min-

ing where the volume of overburden is large relative to the thickness of the coal deposit and where the operator demonstrates that due to volumetric expansion the amount of overburden and other spoil and waste materials removed in the course of the mining operation is more than sufficient to restore the approximate original contour, the operator shall after restoring the approximate contour, backfill, grade, and compact (where advisable) the excess overburden and other spoil and waste materials to attain the lowest grade but not more than the angle of repose, and to cover all acid-forming and other toxic materials, in order to achieve an ecologically sound land use compatible with the surrounding region and that such overburden or spoil shall be shaped and graded in such a way as to prevent slides, erosion, and water pollution and is revegetated in accordance with the requirements of this chapter;

* * * * *

(5) remove the topsoil from the land in a separate layer, replace it on the backfill area, or if not utilized immediately, segregate it in a separate pile from other spoil and when the topsoil is not replaced on a backfill area within a time short enough to avoid deterioration of the topsoil, maintain a successful cover by quick growing plant or other means thereafter so that the topsoil is preserved from wind and water erosion, remains free of any contamination by other acid or toxic material, and is in a usable condition for sustaining vegetation when restored during reclamation, except if topsoil is of insufficient quantity or of poor

quality for sustaining vegetation, or if other strata can be shown to be more suitable for vegetation requirements, then the operator shall remove, segregate, and preserve in a like manner such other strata which is best able to support vegetation;

* * * * *

(7) for all prime farm lands as identified in section 1257(b)(16) of this title to be mined and reclaimed, specifications for soil removal, storage, replacement, and reconstruction shall be established by the Secretary of Agriculture, and the operator shall, as a minimum, be required to—

(A) segregate the A horizon of the natural soil, except where it can be shown that other available soil materials will create a final soil having a greater productive capacity; and if not utilized immediately, stockpile this material separately from other spoil, and provide needed protection from wind and water erosion or contamination by other acid or toxic material;

(B) segregate the B horizon of the natural soil, or underlying C horizons or other strata, or a combination of such horizons or other strata that are shown to be both texturally and chemically suitable for plant growth and that can be shown to be equally or more favorable for plant growth than the B horizon, in sufficient quantities to create in the regraded final soil a root zone of comparable depth and quality to that which existed in the natural soil; and if not utilized immediately, stockpile this material separately from other spoil, and provide needed protection from wind and water

erosion or contamination by other acid or toxic material;

(C) replace and regrade the root zone material described in (B) above with proper compaction and uniform depth over the regraded spoil material; and

(D) redistribute and grade in a uniform manner the surface soil horizon described in subparagraph (A);

* * * * *

(19) establish on the regraded areas, and all other lands affected, a diverse, effective, and permanent vegetative cover of the same seasonal variety native to the area of land to be affected and capable of self-regeneration and plant succession at least equal in extent of cover to the natural vegetation of the area; except, that introduced species may be used in the revegetation process where desirable and necessary to achieve the approved postmining land use plan;

(20) assume the responsibility for successful revegetation, as required by paragraph (19) above, for a period of five full years after the last year of augmented seeding, fertilizing, irrigation, or other work in order to assure compliance with paragraph (19) above, except in those areas or regions of the country where the annual average precipitation is twenty-six inches, or less, then the operator's assumption of responsibility and liability will extend for a period of ten full years after the last year of augmented seeding, fertilizing, irrigation, or other work: *Provided,* That when the regulatory authority approves a long-term intensive agricultural postmining land use, the applicable five- or ten-year period of responsibility for revegetation shall commence at the date of initial planting for such long-term intensive agricul-

tural postmining land use: *Provided further,* That when the regulatory authority issues a written finding approving a long-term, intensive, agricultural postmining land use as part of the mining and reclamation plan, the authority may grant exception to the provisions of paragraph (19) above * * *.

Section 518(c) of the Surface Mining Act, 30 U.S.C. (Supp. I) 1268(c), provides:

> Upon the issuance of a notice or order charging that a violation of the chapter has occurred, the Secretary shall inform the operator within thirty days of the proposed amount of said penalty. The person charged with the penalty shall then have thirty days to pay the proposed penalty in full or, if the person wishes to contest either the amount of the penalty or the fact of the violation, forward the proposed amount to the Secretary for placement in an escrow account. If through administrative or judicial review of the proposed penalty, it is determined that no violation occurred, or that the amount of the penalty should be reduced, the Secretary shall within thirty days remit the appropriate amount to the person, with interest at the rate of 6 percent, or at the prevailing Department of the Treasury rate, whichever is greater. Failure to forward the money to the Secretary within thirty days shall result in a waiver of all legal rights to contest the violation or the amount of the penalty.

Section 519(c) of the Surface Mining Act, 30 U.S.C. (Supp. I) 1269(c), provides in pertinent part:

> The regulatory authority may release in whole or in part said bond or deposit if the authority is satisfied the reclamation covered by the bond

or deposit or portion thereof has been accomplished as required by this chapter according to the following schedule:

* * * * *

(2) After revegetation has been established on the regraded mined lands in accordance with the approved reclamation plan. When determining the amount of bond to be released after successful revegetation has been established, the regulatory authority shall retain that amount of bond for the revegetated area which would be sufficient for a third party to cover the cost of reestablishing revegetation and for the period specified for operator responsibility in section 1265 of this title of reestablishing revegetation. No part of the bond or deposit shall be released under this paragraph so long as the lands to which the release would be applicable are contributing suspended solids to streamflow or runoff outside the permit area in excess of the requirements set by section 1265(b)(10) of this title or until soil productivity for prime farm lands has returned to equivalent levels of yield as nonmined land of the same soil type in the surrounding area under equivalent management practices as determined from the soil survey performed pursuant to section 1257(b)(16) of this title. Where a silt dam is to be retained as a permanent impoundment pursuant to section 1265(b)(8) of this title, the portion of bond may be released under this paragraph so long as provisions for sound future maintenance by the operator or the landowner have been made with the regulatory authority.

Section 522 of the Surface Mining Act, 30 U.S.C. (Supp. I) 1272, provides in pertinent part:

> (a) (1) To be eligible to assume primary regulatory authority pursuant to section 1253 of this title, each State shall establish a planning process enabling objective decisions based upon competent and scientifically sound data and information as to which, if any, land areas of a State are unsuitable for all or certain types of surface coal mining operations pursuant to the standards set forth in paragraphs (2) and (3) of this subsection but such designation shall not prevent the mineral exploration pursuant to the chapter of any area so designated.
>
> (2) Upon petition pursuant to subsection (c) of this section, the State regulatory authority shall designate an area as unsuitable for all or certain types of surface coal mining operations if the State regulatory authority determines that reclamation pursuant to the requirements of this chapter is not technologically and economically feasible.
>
> (3) Upon petition pursuant to subsection (c) of this section, a surface area may be designated unsuitable for certain types of surface coal mining operations if such operations will—
>
> > (A) be incompatible with existing State or local land use plans or programs; or
> >
> > (B) affect fragile or historic lands in which such operations could result in significant damage to important historic, cultural, scientific, and esthetic values and natural systems; or
> >
> > (C) affect renewable resource lands in which such operations could result in a substantial loss or reduction of long-range productivity of water supply or of food or fiber

products, and such lands to include aquifers and acquifer recharge areas; or

(D) affect natural hazard lands in which such operations could substantially endanger life and property, such lands to include areas subject to frequent flooding and areas of unstable geology.

(4) To comply with this section, a State must demonstrate it has developed or is developing a process which includes—

(A) a State agency responsible for surface coal mining lands review;

(B) a data base and an inventory system which will permit proper evaluation of the capacity of different land areas of the State to support and permit reclamation of surface coal mining operations;

(C) a method or methods for implementing land use planning decisions concerning surface coal mining operations; and

(D) proper notice, opportunities for public participation, including a public hearing prior to making any designation or redesignation, pursuant to this section.

(5) Determinations of the unsuitability of land for surface coal mining, as provided for in this section, shall be integrated as closely as possible with present and future land use planning and regulation processes at the Federal, State, and local levels.

(6) The requirements of this section shall not apply to lands on which surface coal mining operations are being conducted on August 3, 1977, or under a permit issued pursuant to this chapter, or where substantial legal and financial commitments in such operation were in existence prior to January 4, 1977.

* * * * *

(c) Any person having an interest which is or may be adversely affected shall have the right to petition the regulatory authority to have an area designated as unsuitable for surface coal mining operations, or to have such a designation terminated. Such a petition shall contain allegations of facts with supporting evidence which would tend to establish the allegations. Within ten months after receipt of the petition the regulatory authority shall hold a public hearing in the locality of the affected area, after appropriate notice and publication of the date, time, and location of such hearing. After a person having an interest which is or may be adversely affected has filed a petition and before the hearing, as required by this subsection, any person may intervene by filing allegations of facts with supporting evidence which would tend to establish the allegations. Within sixty days after such hearing, the regulatory authority shall issue and furnish to the petitioner and any party to the hearing, a written decision regarding the petition, and the reasons therefore.[1] In the event that all the petitioners stipulate agreement prior to the requested hearing, and withdraw their request, such hearing need not be held.

(d) Prior to designating any land areas as unsuitable for surface coal mining operations, the regulatory authority shall prepare a detailed statement on (i) the potential coal resources of the area, (ii) the demand for coal resources, and (iii) the impact of such designation on the environment, the economy, and the supply of coal.

(e) After August 3, 1977, and subject to valid existing rights no surface coal mining operations except those which exist on August 3, 1977, shall be permitted—

* * * * *

(4) within one hundred feet of the outside right-of-way line of any public road, except where mine access roads or haulage roads join such right-of-way line and except that the regulatory authority may permit such roads to be relocated or the area affected to lie within one hundred feet of such road, if after public notice and opportunity for public hearing in the locality a written finding is made that the interests of the public and the landowners affected thereby will be protected; or

(5) within three hundred feet from any occupied dwelling, unless waived by the owner thereof, nor within three hundred feet of any public building, school, church, community, or institutional building, public park, or within one hundred feet of a cemetery.

Section 701(20) of the Surface Mining Act, 30 U.S.C. (Supp. I) 1291(20), provides:

For the purposes of this chapter—

(20) the term "prime farmland" shall have the same meaning as that previously prescribed by the Secretary of Agriculture on the basis of such factors as moisture availability, temperature regime, chemical balance, permeability, surface layer composition, susceptibility to flooding, and erosion characteristics, and which historically have been used for intensive agricultural purposes, and as published in the Federal Register.

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